In the Supreme Court
OF THE
United States

OCTOBER TERM, 1940

No.

CLAUDE C. LONG,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

DATE OF JUDGMENT OF TRIAL COURT.

The judgment of the trial court was entered August 21, 1937. (Typewritten Transcript Vol. I, pages 127, 128.)

II.

THE OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of the State of California was rendered June 27, 1940, and is printed

in 103 Pac. (2d) 969, and in the appendix hereto. The opinions of the District Court of Appeal, printed in the appendix at pages 33 *et seq.* and 59 *et seq.*, are reported in 96 Pac. (2d) 354 and 96 Pac. (2d) 1021 respectively.

III.

DATE OF JUDGMENT OF APPELLATE COURT.

The judgment of the Supreme Court of the State of California affirming the judgment of the lower court was entered June 27, 1940. (Transcript of Record, Vol. II, page 1572.)

IV.

THE JURISDICTION.

The statutory provision under which jurisdiction is invoked is Section 237 of the Judicial Code; U. S. C. A. Title 28, Section 344, Subdivision b.

V.

STATEMENT OF GROUNDS OF JURISDICTION AND STATEMENT OF THE CASE.

A full statement of the grounds of jurisdiction and of the case has been given under like headings in the petition, and, in the interest of brevity, is not repeated at this point.

VI.

SPECIFICATION OF ERRORS.

The errors are sufficiently specified in the statement of the grounds upon which it is contended the questions involved are substantial, contained in the foregoing petition, and in the summary of argument herein.

VII.

ARGUMENT.

SUMMARY OF ARGUMENT.

(I) WHETHER THE ABORTION PERFORMED BY PETITIONER WAS NECESSARY TO SAVE THE LIFE OF THE DECEASED, WAS A CLINICAL QUESTION WHICH COULD BE SOLVED BY EXPERT TESTIMONY ALONE, AND THEREFORE EXPERT TESTIMONY WAS THE ONLY MEANS BY WHICH PETITIONER COULD ESTABLISH HIS INNOCENCE.

(II) BY GIVING THE INSTRUCTION COMPLAINED OF, THE TRIAL COURT VIOLATED PETITIONER'S RIGHT TO DUE PROCESS OF LAW.

(III) THE SUPREME COURT OF CALIFORNIA, BY UPHOLDING THE GIVING OF THE INSTRUCTION, HAS DENIED TO PETITIONER THE EQUAL PROTECTION OF THE LAWS.

(I)

WHETHER THE ABORTION PERFORMED BY PETITIONER WAS NECESSARY TO SAVE THE LIFE OF THE DECEASED, WAS A CLINICAL QUESTION WHICH COULD BE SOLVED BY EXPERT TESTIMONY ALONE, AND THEREFORE EXPERT TESTIMONY WAS THE ONLY MEANS BY WHICH PETITIONER COULD ESTABLISH HIS INNOCENCE.

The California courts have long recognized that the correctness of diagnosis and treatment by a physician and surgeon, the necessity for an operation, and the skill with which the same is performed, are matters which can be proved by expert testimony alone, save in a very limited class of cases, of which this is not one, in which the doctrine of *res ipsa loquitur* can be applied. **"As to what is, or is not, the proper practice, is uniformly a question for experts and can be established only by their testimony."**

Patterson v. Marcus, 203 Cal. 550, 265 Pac. 222.

> "The true rule, as we understand, is this: ordinarily, negligence on the part of a physician or surgeon must be proved by expert evidence, **and when the matter in issue is one within the knowledge of experts only, and is not within the common knowledge of laymen, the expert evidence is conclusive."**
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> *Nicholas v. Jacobson,* 113 Cal. App. 382, 298 Pac. 505.

Other jurisdictions adhere to the same rule:

Brewer v. Ring, 177 N. C. 476, 99 S. E. 358, 364;
Jaeger v. Stratton, 170 Wis. 579, 176 N. W. 61;
Schumacker v. Murray Hospital, 58 Mont. 447, 193 Pac. 397, 403;
Edwards v. Uland, 193 Ind. 376, 140 N. E. 546, 548.

This rule has been applied in cases involving the necessity of performing a therapeutic abortion, and it has been held that the testimony of laymen, or even of the patient herself, is insufficient to even create a conflict.

> "The question whether miscarriage was necessary to have the life of the patient was necessarily, upon this record, a question of medical opinion. * * * We held in the Aiken case (State v. Aiken, 109 Iowa 643, 80 N. W. 1073), that **the diagnosis of a regular physician may not be negatived by that kind of testimony.** If the diagnosis of a regular physician discloses an internal condition of a patent which threatens his life, it may not be negatived by the mere fact that the patient is unconscious of it and feels well, and is apparently well. Fatal conditions are often found in patients who were wholly unsuspecting of their danger."
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> *State v. Dunklebarger,* 206 Iowa 971, 221 N. W. 592.

(II)

BY GIVING THE INSTRUCTION COMPLAINED OF, THE TRIAL COURT VIOLATED PETITIONER'S RIGHT TO DUE PROCESS OF LAW.

Since the testimony of experts was the only evidence by which petitioner could establish his defense that the operation was necessary to preserve life, it follows that the complained of instruction deprived him of his means, and his only means, of establishing his innocence, because the instruction gave the jury the right to disregard testimony which, in such cases is conclusive. This was a deprivation of his right to due process of law, because that right includes not

only the right to citation and notice of a hearing, but the right to present a full defense.

> "The offender must be allowed to offer evidence and argument in his defense, otherwise, any judgment which the Court may pronounce, will be absolutely void."
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> *McClatchy v. Superior Court,* 119 Cal. 413, 51 Pac. 696, citing:
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> *Postal Telegraph Co. v. Adams,* 155 U. S. 689, 698;
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> *Hovey v. Elliott,* 167 U. S. 409;
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> *Galpin v. Page,* 18 Wall. 350, 21 L. Ed. 959.

> "Can it be doubted that due process of law signifies a right to be heard in one's defense? * * * **It would be like saying to the party 'Appear and you shall be heard'; and, when he has appeared, saying 'Your appearance shall not be recognized, and you shall not be heard'.**"
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> *Hovey v. Elliott,* supra.

> "This ruling was not mere error. It was a complete denial of a right of trial."
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> *In re Cunha,* 123 Cal. App. 625, 634, 11 Pac. (2d) 902.

(III)

THE SUPREME COURT OF CALIFORNIA, BY UPHOLDING THE GIVING OF THE INSTRUCTION, HAS DENIED TO PETITIONER THE EQUAL PROTECTION OF THE LAWS.

In his masterful dissenting opinion in this cause, Mr. Justice Carter quotes at length from the earlier

California case of *Pearson v. Crabtree,* 70 Cal. App. 52, 232 Pac. 715, which holds that the giving of the very instruction given in this cause was reversible error. We can do no better in presenting this portion of the argument than to quote from Mr. Justice Carter's dissent:

> "In other words, the principal issue in the trial of this case and the sole foundation stone upon which the defense was based, namely, that the performance of the abortion was necessary to preserve the life of the deceased, was of necessity, and in the very nature of things, predicated solely upon expert testimony. Common sense as well as legal reasoning dictates that no one without expert knowledge and skill in the subjects of anatomy and medical science would be qualified to testify on this subject, and it has been the settled law of this State for decades that when the sole issue in a case is the subject of expert knowledge of medical science, that such issue must be decided solely upon the testimony of those learned in the practice of medicine and surgery. (Perkins v. Trueblood, 180 Cal. 437; Arnold v. Hopkins, 203 Cal. 553; Houghton v. Dickson, 29 Cal. App. 321; Dameron v. Ansboro, 39 Cal. App. 289; Pearson v. Crabtree, 70 Cal. App. 52; William Simpson Construction Company v. Industrial Accident Commission, 74 Cal. App. 239; Ingamells v. Goodfellow, 109 Cal. App. 62; Roberts v. Parker, 121 Cal. App. 264.)
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> "The case of Pearson v. Crabtree, supra, has been uniformly followed in this and other jurisdictions where the common law prevails and is recognized as the settled law of this State.

"There is little doubt, in my opinion, that if the case at bar were a civil action in which a judgment had been recovered by a plaintiff upon the same factual situation as that disclosed by the record in this case, and such an instruction had been given as the one quoted in the majority opinion in this case, the court would have no hesitancy in reversing such a judgment upon the authority of the case of Pearson v. Crabtree, supra, and Hirshfeld v. Dana, 193 Cal. 142, upon the ground that such instruction was prejudicially erroneous and probably resulted in a miscarriage of justice.

"**To hold that the giving of such an instruction as the one given in the case at bar is prejudicial in a civil case and not in a criminal case, is to my mind a holding in effect that life and liberty are of less concern to human beings than property.** I am opposed to any such concept and I firmly believe that the application of the law should be more rigid and more strictly construed in the protection of the lives and liberties of our people than in the protection of their property rights.

"There can be no escape from the conclusion that the jury in the case at bar were plainly told by the trial judge not only that they could regard the testimony of an expert as merely **advisory,** but that they **may disregard altogether the testimony of such expert,** and form their own conclusions from all the evidence submitted to them. To say that such an instruction did not deprive the defendant of the benefit of the expert testimony submitted by both the prosecution and the defense is stating an obvious contradiction. If such an instruction can be cured by the application of section 4½ of article VI of the Constitution, then in

my opinion it must necessarily follow that a defendant in a criminal case is not entitled as a matter of legal right to have the jury instructed on the law applicable to the facts of the case presented to the trial court during the trial of his case and that this section of the Constitution can be resorted to for the purpose of **depriving a person of the equal protection of the law guaranteed by the 14th Amendment to the Constitution of the United States.**" (Apendix, pages 27-32.)

CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, and that to such an end, a writ of certiorari should be granted; that the judgment of the Supreme Court of the State of California should be reversed, and the cause remanded to the State Court with directions that it cause to be done what of right and according to the Constitution, laws and customs of the United States ought to be done.

Dated, San Francisco, California,
September 11, 1940.

EDWARD A. CUNHA,
WILLIAM F. HERRON,
JOHN J. TAAFFE,
HERBERT W. ERSKINE,
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(Appendix Follows.)